

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD H.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C20-5124-BAT

ORDER REVERSING THE COMMISSIONER'S DECISION

Plaintiff appeals the ALJ’s decision him not disabled. He contends the ALJ misevaluated his testimony, his residual functional capacity (“RFC”), and entered erroneous step five findings. Dkt. 14 at 2. Plaintiff also argues evidence submitted to the Appeals Council undermines the ALJ’s decision. *Id.* As discussed below, the Court **REVERSES** the Commissioner’s final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

In November 2017, plaintiff applied for benefits, alleging disability as of September 1, 2017. Tr. 213-25. After the applications were denied initially and on reconsideration, the ALJ conducted a hearing in October 2018 (Tr. 41-77), and found Plaintiff not disabled. Tr. 17-25.

1 The Appeals Council denied review, making the ALJ's decision is the Commissioner's final
2 decision. Tr. 3-7.

3 THE ALJ'S DECISION

4 Utilizing the five-step disability evaluation process,¹ the ALJ found:

5 **Step one:** Plaintiff had not engaged in substantial gainful activity since the alleged onset
date.

6 **Step two:** Plaintiff had the following severe impairments: chronic systolic congestive
heart failure, nonischemic cardiomyopathy, atrial fibrillation, and obesity.

7 **Step three:** These impairments did not meet or equal the requirements of a listed
imPAIRMENT.²

8 **RFC:** Plaintiff can perform light work with additional limitations: he can stand and walk
9 for four hours, with a sit/stand option. He can occasionally climb ramps and stairs, and
10 cannot climb ladders, ropes, and scaffolds. He can frequently balance, and occasionally
11 stoop, kneel, crouch, and crawl. He can have frequent exposure to hazards, such as
12 heights and machinery, and can have frequent exposure to fumes, odors, dusts, gases, and
poor ventilation.

13 **Step four:** Plaintiff cannot perform his past work.

14 **Step five:** As there are jobs that exist in significant numbers in the national economy that
Plaintiff can perform, he is not disabled.

15 Tr. 17-25.

16 DISCUSSION

17 A. Plaintiff's Testimony

18 The ALJ discounted Plaintiff's testimony because he made several inconsistent
19 statements and as unsupported by objective medical evidence. Tr. 22-23. Plaintiff argues these
20 reasons are not clear and convincing, as required in the Ninth Circuit. *See Burrell v. Colvin*, 775
21 F.3d 1133, 1136-37 (9th Cir. 2014).

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23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 The ALJ properly cited several examples where Plaintiff made inconsistent statements.
 2 The ALJ noted Plaintiff reported limitations in his agency paperwork that were inconsistent with
 3 his hearing testimony. Tr. 23. The ALJ found Plaintiff's hearing testimony about his diet
 4 contradicted his reports to providers, and he also admitted to inaccurately reporting his
 5 educational history due to embarrassment. Tr. 22-23. The ALJ also noted Plaintiff's report he
 6 stopped working due to his impairments, is inconsistent with his later report he stopped working
 7 because he ran out of business. Tr. 23 (citing Tr. 255). The Court cannot say the ALJ
 8 unreasonably relied upon inconsistencies in plaintiff's testimony to discount his testimony. *See*
 9 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (ALJ appropriately considers
 10 inconsistencies in assessing plaintiff's testimony); *Thomas v. Barnhart*, 278 F.3d 947, 958-59
 11 (9th Cir. 2002) (holding an ALJ also appropriately considers inconsistencies or contradictions
 12 between a claimant's statements and her activities of daily living); *Bruton v. Massanari*, 268
 13 F.3d 824, 828 (9th Cir. 2001) (specific, cogent reason for disregarding testimony included
 14 inconsistent statements as to why claimant left job).

15 Because the ALJ must reconsider the medical evidence in light of the Appeals Council
 16 evidence, as explained *infra*, the Court need not address the sufficiency of the ALJ's other reason
 17 for discounting Plaintiff's allegations, at this juncture

18 **B. RFC Assessment and Vocational Testimony**

19 At step five, the Commissioner bears the burden to show a claimant is not disabled and
 20 can perform other work that exists in significant numbers in the national economy. 20 C.F.R. §
 21 416.960(c)(2). The ALJ's step-five findings rely on the testimony of the vocational expert
 22 ("VE") from the hearing, where the ALJ initially posed a hypothetical assuming the ability to
 23 perform light work with additional physical limitations. Tr. 72-73. The VE identified three jobs

1 compatible with such an RFC: agricultural sorter, marker, and electrical accessories assembler.
 2 Tr. 73-74. The ALJ then added a restriction to the hypothetical: a limitation to standing/walking
 3 for four hours per workday. Tr. 74. The VE testified the three jobs identified would still be
 4 compatible with that restriction, because:

5 . . . [T]he jobs I provided, are actually light jobs with a stand – sit/stand option
 6 now, and they do at least four hours in an eight hour day. There's some jobs in
 7 the [Dictionary of Occupational Titles] that are signified as light based on the lift
 8 and carry requirements, and not on the stand and walk requirements, which most
 9 people think of as light. Now, the Electrical Accessories Assembler, and – the
 10 Electrical Accessories Assembler sits on a stool at a bench. And that's at least six
 out of eight hours. The person would have the ability to slide on and off the
 bench – I'm sorry – on and off the stool as required, or as necessary, as long as
 the person limited the change of position to only every 20 minutes or more. Less
 than 20 minutes in change of position will eventually erode the labor – or erode
 the pace of the job by the end of the shift.

11 Tr. 74.

12 Plaintiff raises three challenges to the ALJ's reliance on the VE's testimony. First,
 13 Plaintiff argues the VE failed to define what she meant by the term "sit/stand option," and the
 14 ALJ's RFC assessment using that term is thus impermissibly vague. Dkt. 14 at 6. Plaintiff
 15 contends an ALJ's RFC assessment must specify how frequently a claimant must alternate
 16 between sitting and standing; because the VE's testimony was offered without that specificity, it
 17 cannot cure the ALJ's failure to provide that specificity. *Id.* In support of the argument, Plaintiff
 18 points to two sections of the VE's testimony he contends suggest ambiguity in the ALJ's RFC
 19 assessment and/or the VE's testimony: namely the VE's testimony an electrical accessories
 20 assembler could not alternate positions more frequently than every 20 minutes and maintain
 21 adequate pace, and the VE's testimony about how much sitting and standing was involved in
 22 each of the jobs. Dkt. 14 at 6-7.

1 Regarding Plaintiff's first argument, the Court finds the ALJ's RFC or the VE's
2 testimony is not impermissibly vague as to the meaning of "sit/stand option," given the plain
3 meaning of the words and cases finding the "sit/stand option" refers to an option to sit or stand at
4 will. *See, e.g., Buckner-Larkin v. Astrue*, 450 Fed. Appx. 626, 627 (9th Cir. Sep. 20, 2011);
5 *Sackett v. Berryhill*, 2019 WL 1787337, at *12-14 (D. Nev. Apr. 24, 2019). The Court finds
6 "common sense dictates that a 'sit/stand option' means exactly what it says; plaintiff must have
7 the option to either sit or stand at work. This is consistent with a requirement that plaintiff have
8 the ability to 'sit or stand at will.'" *Swofford v. Comm'r of Social Sec. Admin.*, 2013 WL
9 3333063, at *6 (D. Or. Jul. 1, 2013). Although Plaintiff relies on Social Security Ruling 96-9p to
10 argue the ALJ was required to provide more specificity as to how frequently Plaintiff could
11 alternate between sitting and standing, that ruling applies to claimants limited to less than the full
12 range of sedentary work, and Plaintiff here is not so limited. *See* 1996 WL 374185 (Jul. 2,
13 1996).

14 The Court does find merit in Plaintiff's second argument. Sitting or standing at will is
15 inconsistent with performing the electrical accessories assembler job, given the VE's testimony
16 regarding alternating no more frequently than every 20 minutes. *See* Tr. 74. Thus, because the
17 ALJ's RFC assessment permits Plaintiff to alternate at will, and the VE testified an electrical
18 accessories assembler may not alternate more frequently than every 20 minutes, there is a
19 conflict between the RFC assessment and the VE's testimony pertaining to this job. This error is
20 harmless, however, because the other jobs identified at step five exist in significant numbers
21 even if the electrical accessories assembler job is eliminated. *See* Tr. 25 (listing more than
22 350,000 national agricultural sorter and marker jobs).

1 Plaintiff's third argument depends upon the meaning of the VE's testimony that the step-
 2 five jobs require the employee to, with a sit/stand option, "do at least four hours in an eight hour
 3 day." Tr. 74. Plaintiff argues the VE referred to the jobs requiring an employee to do at least
 4 four hours of standing or walking in a workday, which is incompatible with the ALJ restricting
 5 Plaintiff to performing at most four hours of standing/walking. This is not a reasonable reading
 6 of the VE's testimony: it appears the VE meant the step-five jobs involved at least four hours of
 7 *sitting*, not standing/walking (in light of the VE's subsequent testimony about the possibility of
 8 at least six hours of sitting in the electrical accessories assembler job (Tr. 74)), and thus there
 9 would be no conflict because the ALJ did not impose any sitting restrictions in the RFC
 10 assessment. Furthermore, the ALJ sought clarification and the VE affirmed explicitly a person
 11 limited to standing/walking four hours with a sit/stand option can perform all of the step-five
 12 jobs. *See* Tr. 74-75. When the VE's testimony is read in its entirety, Plaintiff's interpretation
 13 that the testimony conflicts with the ALJ's RFC assessment fails.

14 Because Plaintiff fails to establish harmful error in either the ALJ's RFC assessment or
 15 step-five findings, the Court will not disturb these portions of the ALJ's decision.

16 **C. Appeals Council Evidence**

17 Plaintiff submitted a November 2018 treatment note and a November 2018 opinion of
 18 non-examining physician Myrna Palasi, M.D., to the Appeals Council, and contends that both
 19 undermine the ALJ's January 2019 decision. *See* Tr. 32-40. The Appeals Council considered
 20 this evidence and found it failed to provide a basis to reverse the ALJ's decision, and refused to
 21 exhibit it. Tr. 3-7. The Court considers this evidence in reviewing the ALJ's decision for
 22 substantial evidence. *See Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157, 1163 (9th
 23 Cir. 2012) ("[W]hen the Appeals Council considers new evidence in deciding whether to review

1 a decision of the ALJ, that evidence becomes part of the administrative record, which the district
2 court must consider when reviewing the Commissioner's final decision for substantial
3 evidence.”).

4 Plaintiff contends the treatment note shows his condition worsened by at least mid-2018,
5 such that the ALJ's RFC assessment for light work does not accurately describe his limitations
6 for the entire adjudicated period. Dkt. 14 at 8-9. The treatment note shows Plaintiff's treating
7 doctor rated his heart failure as less severe in January 2018 than he rated it in November 2018.
8 *Compare* Tr. 39 with Tr. 436. The treatment note indeed suggests that Plaintiff's treating doctor
9 found Plaintiff's heart failure had worsened per the New York Health Association's scale, but
10 this scale does not correspond to any particular RFC limitations or show the ALJ's RFC
11 assessment is inaccurate. *See* <https://www.heart.org/en/health-topics/heart-failure/what-is-heart-failure/classes-of-heart-failure> (last accessed Nov. 24, 2020). This treatment note does not alone
12 constitute evidence of material worsening in Plaintiff's condition, and thus does not contradict or
13 undermine the ALJ's decision.

15 On the other hand, Dr. Palasi's opinion is, despite the Commissioner's argument to the
16 contrary (Dkt. 15 at 11-12), inconsistent with the ALJ's RFC assessment because it describes
17 lifting restrictions incompatible with light work, and also describes manipulative limitations that
18 the ALJ did not reference. *See* Tr. 33. Dr. Palasi's opinion Plaintiff could only stand or walk for
19 brief periods (Tr. 33) is arguably consistent with the ALJ's RFC assessment, given that the ALJ
20 provided Plaintiff the option to sit or stand at will for up to four hours in a work day.

21 Dr. Palasi's opinion was rendered after reviewing a November 2018 report from Valley
22 View Health, but this report is not in the record and Dr. Palasi left blank the section of the form
23 opinion asking whether the objective evidence supports the opined diagnoses and limitations.

1 Tr. 32. The Commissioner surmises Dr. Palasi copied the diagnoses and limitations from the
2 Valley View Health documents (Dkt. 15 at 11), but even so, that would only bolster Plaintiff's
3 argument Dr. Palasi's opinion is probative evidence of limitations not accounted for in the ALJ's
4 RFC assessment, given the ALJ did not consider a treating source opinion describing Plaintiff's
5 limitations.

6 The Court finds Dr. Palasi's opinion undermines the ALJ's decision because it indicates
7 treatment notes written during the adjudicated period have not been considered by the ALJ and
8 would at least arguably support limitations more restrictive than the ALJ found. This case must
9 be remanded to permit the ALJ to consider Dr. Palasi's opinion and, if possible, the underlying
10 evidence she reviewed.

11 CONCLUSION

12 For the foregoing reasons, the Commissioner's decision is **REVERSED** and this case is
13 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).
14 On remand, the ALJ shall consider the evidence submitted to the Appeals Council, develop the
15 record and redetermine the RFC as needed, reconsider any aspect of the decision as necessary in
16 light of the new assessments and any other new evidence submitted or obtained, and proceed to
17 steps four and five as appropriate.

18 DATED this 24th day of November, 2020.

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BRIAN A. TSUCHIDA
Chief United States Magistrate Judge